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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SHENZHEN SMOORE  
TECHNOLOGY CO. LTD.,

*Plaintiff,*

v.

NEXT LEVEL VENTURES, LLC and  
ADVANCED VAPOR DEVICES LLC,

*Defendants.*

Case No.: 2:22-cv-07646-AB-AGR

**COUNTERCLAIM-  
DEFENDANT'S NOTICE OF  
MOTION TO DISMISS  
COUNTERCLAIM-PLAINTIFF'S  
COUNTERCLAIMS AND  
STRIKE AFFIRMATIVE  
DEFENSES OR, IN THE  
ALTERNATIVE, TO  
BIFURCATE AND STAY  
ANTITRUST  
COUNTERCLAIMS;  
MEMORANDUM OF POINTS  
AND AUTHORITIES**

Date: Oct. 11, 2024<sup>1</sup>  
Time: 10 a.m.

Courtroom 7B  
Judge: Hon. André Birotte Jr.

Complaint Filed: 10/19/2022

<sup>1</sup> The parties are discussing rescheduling of both the hearing on this motion and the scheduling conference following the parties' Rule 26(f) Report for November 1, 2024, but an agreement has not yet been finalized.

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that at the above time and place, Counterclaim-Defendant Shenzhen Smoore Technology Co. Ltd. (“Smoore”) will and hereby does move this Court under Federal Rule of Civil Procedure 12(b)(6) to dismiss Counterclaim-Plaintiff Next Level Ventures, LLC’s (“NLV”) counterclaims for failure to state a claim upon which relief can be granted, strike NLV’s and Defendant A&A Global Imports, Inc.’s (“A&A”) affirmative defenses, or in the alternative, to bifurcate and stay discovery regarding NLV’s antitrust counterclaims. Counterclaim-Defendant’s motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the Proposed Order, and reply brief filed, and any arguments presented at the hearing.

This motion is made following the conferences of counsel pursuant to L.R. 7-3, which took place on August 22 and September 5, 2024.

Dated: September 13, 2024 Baker Botts L.L.P.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. PRELIMINARY STATEMENT

Plaintiff and Counterclaim-Defendant Shenzhen Smoore Technology Co. Ltd. (“Smoore”) brought this lawsuit to enforce several patents related to components used in the manufacture of vaping systems. Seeking to gain leverage rather than defend on the merits, defendant Next Level Ventures, LLC (“NLV,” an alleged competitor to Smoore) launched clumsy antitrust counterclaims that falter under well-established First Amendment principles and Supreme Court caselaw.

NLV has pled itself out of all its antitrust claims. First, NLV has pled a relevant product market—“closed cannabis oil vaporizer systems”—that is legally deficient on its face. Smoore is a manufacturer of components that **go into** the finished product “systems” constituting the alleged relevant product market, not the “systems” themselves. It is black-letter law that antitrust claims cannot succeed on an alleged relevant market in which the defendant does not participate. All of NLV’s antitrust counterclaims must therefore be dismissed. (Counts III-VI.)

Second, NLV’s boilerplate claims that Smoore is exercising “monopoly power” or has a “dangerous probability” of obtaining a monopoly are explicitly contradicted by the few facts NLV does allege. (Counts IV, V, VI.) As an initial matter, Smoore has zero market share in the alleged relevant market (in which it does not participate) and thus cannot be or plausibly become a monopolist. Even assuming Smoore did participate in the alleged relevant market, NLV has pled itself out of its monopolization claims. NLV concedes that Smoore’s market position and profits have precipitously **declined**, that Smoore’s “rapid decline in fortunes” started “around 2018 or 2019,” and that “[e]ven as the market for cannabis vaporizers was growing, with sales as much as doubling between 2020 and 2022, Smoore’s market share quickly began to erode” by at least 20 to 30 percent. ECF No. 36, NLV Answer & Countercl. (“A&C”) ¶¶ 27-31; 83, 100. NLV’s allegations belie its factually unsupported claims that Smoore is or has a dangerous probability of

1 exercising monopoly power.

2 NLV's arguments that it has been "substantially foreclosed" from the relevant  
3 market are also factually threadbare and contradicted by the counterclaims. Again,  
4 Smoore could not have excluded NLV from a relevant market in which neither  
5 company participates. And NLV's allegations that Smoore has ceded substantial  
6 market share *to NLV* and other "upstart American competitors" at increasing rates  
7 since 2018, A&C ¶ 29, refutes any notion that Smoore can "substantially foreclose"  
8 NLV or any competitor from the alleged market. NLV's sole factual allegation in  
9 support of its alleged foreclosure is its claim that Smoore has an exclusive  
10 agreement with a single U.S. distributor. But the law is clear: NLV's alleged loss of  
11 access to a single distributor is insufficient to establish substantial foreclosure.

12 NLV's counterclaims that Smoore's patent enforcement efforts are  
13 anticompetitive also fail as a matter of law. (Counts IV, V, VI.) These claims are  
14 categorically barred by the First Amendment and *Noerr-Pennington* immunity.  
15 NLV's allegations that Smoore has engaged in "sham litigation," based in large part  
16 on the '623 patent that is not even at issue here, ongoing Chinese patent litigation  
17 against a third party that Smoore has twice won, and the present litigation, fall far  
18 short of satisfying any of the narrow exceptions to *Noerr-Pennington* immunity.

19 Further, NLV's induced infringement counterclaim does not plead the  
20 requisite knowledge, and its and A&A's affirmative defenses are deficiently pled.

21 NLV's antitrust and patent counterclaims should be dismissed in their entirety  
22 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and  
23 NLV's and A&A's affirmative defenses should be stricken. In the alternative, if any  
24 antitrust counterclaims proceed, they should be bifurcated and discovery stayed.

## 25 **II. LEGAL STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)**

26 To survive dismissal, a counterclaim must allege sufficient facts to rise above  
27 the "speculative," "conceivable," or "possible," and instead must "state a claim to  
28 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545,

547, 555, 563, 570, 591 (2007); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It “must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp.*, 146 F. Supp. 3d 1217, 1225 (S.D. Cal. 2015) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

### III. NLV’S COUNTERCLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

NLV fails to plausibly state a claim for relief with its allegations that Smoore (1) has restrained competition in or monopolized a relevant market for “closed cannabis oil vaporizer systems,” (2) used anticompetitive distribution agreements in distributing its products, (3) has enforced its patents through anticompetitive litigation, (4) has a dangerous probability of monopolizing any relevant market, (5) has violated the California Cartwright Act, or (6) is infringing one of NLV’s patents.

#### A. NLV Fails to Allege a Relevant Market in Which Smoore Actually Competes, as Required for All of Its Antitrust Claims

Defining a relevant product market is a necessary “threshold step in any antitrust case.” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020). To support a claim for antitrust liability, that market must encompass “the area of effective competition” in order to reliably “measure the defendant’s ability to lessen or destroy competition.” *Id.* (citing *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018)). “It is axiomatic in antitrust law that a defendant may not be found liable under the Sherman Act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market . . . .” *Transphase Sys., Inc. v. S. California Edison Co.*, 839 F. Supp. 711, 717 (C.D. Cal. 1993) (granting motion to dismiss where antitrust defendants “[we]re not really competitors in th[e alleged] product market”).

NLV’s antitrust counterclaims must be dismissed because they allege a relevant product market in which Smoore does not even compete. NLV alleges that

1 the relevant product market is “closed cannabis oil vaporizer systems,” A&C ¶ 70,  
2 and that such systems are sold by “cannabis oil producers . . . to retail outlets and  
3 consumers through various retail methods.” *Id.* ¶ 68; *see also id.* ¶ 79 (“Closed  
4 cannabis oil vaporizer systems are thus a distinct market . . . [and] are sold to  
5 **cannabis consumers.**”) (emphasis added). Smoore does not sell anything to either  
6 “retail outlets [or] consumers.” But, as NLV admits, Smoore sells “wholesale  
7 vaporizer hardware” to cannabis oil producers, who then assemble that hardware  
8 into complete “systems” with the key ingredient—the cannabis itself—which are  
9 then sold to consumers. *See id.* ¶¶ 68-69 (“Neither Smoore, through CCELL, nor  
10 NLV produce cannabis oil or cannabis products.”). NLV also admits that Smoore  
11 could not sell what it defines as “closed cannabis oil vaporizer systems” to  
12 consumers, because “[c]annabis is illegal in China,” where Smoore manufactures its  
13 hardware. *Id.* ¶ 19. NLV’s factual allegations, if proven, would establish that  
14 Smoore is a supplier of **some component parts** for “closed cannabis oil vaporizer  
15 systems,” not the systems themselves.

16 NLV thus bases its entire panoply of antitrust claims on an impossible  
17 allegation: that Smoore “had and has monopoly power in the closed cannabis oil  
18 vaporizer **systems** market in the United States.” *Id.* ¶ 94 (emphasis added).  
19 Smoore’s share of that “market” is zero. NLV’s antitrust claims cannot survive its  
20 admission that Smoore **does not even compete** in this alleged market. *See*  
21 *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124,  
22 1131 (9th Cir. 2015) (“The complaint posits three relevant markets . . . Because  
23 [defendant] is not a competitor in any of the three markets, they cannot serve as the  
24 basis for a § 2 monopoly claim.”); *Transphase Sys.*, 839 F. Supp. at 717.

25 **B. NLV’s Allegations of Anticompetitive Contracts Between Smoore and**  
26 **Its Distributors Fail to State a Claim.**

27 NLV’s claims that it has been harmed by Smoore’s contracts with its  
28 distributors fail as a matter of law. *See* A&C ¶¶ 119-45 (Counts III (conspiracy), IV

(monopolization), V (attempted monopolization), and VI (Cal. Cartwright Act)).

**1. NLV Cannot Show Antitrust Injury from Its Allegations that Smoore Conspired to Inflate Prices**

To properly allege a claim under the Sherman Act, NLV must plausibly allege “antitrust injury.” *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). This requires more than simply alleging an “injury causally linked” to an antitrust violation—the injury **must** be “of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Id.* NLV’s own pleading demonstrates that it cannot have suffered an antitrust injury from allegedly inflated prices under clear Supreme Court precedent.

NLV pled that it is a competitor to Smoore. *See, e.g., A&C ¶¶ 28, 129.* Supreme Court precedent holds that competitors lack standing to challenge alleged conduct under the Sherman Act that allegedly raises prices or restricts output, because such alleged harms benefit competitors like NLV:

Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, but **it could not injure respondents: as petitioners’ competitors, respondents stand to gain from any conspiracy to raise the market price** [of the relevant product]. Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, **actually benefit competitors by making supracompetitive pricing more attractive.**

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (emphasis added); *see Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 337 (1990) (“A competitor may not complain of conspiracies that set minimum prices at any level.”); *Morning Star Packing Co. v. SK Foods, L.P.*, No. 2:09-cv-00208-KJM-EFB, 2017 WL 2572459, at \*7 (E.D. Cal. June 14, 2017) (holding that competitors cannot suffer antitrust injury from “an arrangement to sell to a limited number of distributors with a goal of avoiding intragroup competition”).

1 All of NLV's Sherman Act claims based on an alleged agreement between  
2 Smoore and its distributors to fix or raise prices, allocate customers, or otherwise  
3 limit competition thus fail to allege antitrust injury and should be dismissed.

4 **2. NLV's Alleged Injuries from Smoore's Distribution Contracts**  
5 **Are Conclusory, Implausible, and Trivial.**

6 "Antitrust laws are designed to protect competition, not competitors," and  
7 require that any alleged "restraint must be of significant magnitude, and more than  
8 trivial." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 951  
9 (9th Cir. 1998). NLV's alleged injuries lack any factual support and allege, at best, a  
10 trivial loss of access to a single distributor rather than market-wide harm.

11 First, NLV alleges without factual support that Smoore caused it to "incur[]"  
12 higher costs to manufacture and distribute closed cannabis oil vaporizer systems."  
13 See A&C ¶¶ 125, 126, 133, 139. There is nothing in the counterclaims to  
14 substantiate any plausible causal link between Smoore's conduct and NLV's  
15 manufacturing costs, let alone the "direct" causal link required by the Ninth Circuit.  
16 See *Choker v. Pet Emergency Clinic, P.S.*, No. 22-35650, 2023 WL 8888632, at \*1  
17 (9th Cir. Dec. 26, 2023) (affirming dismissal for lack of antitrust injury and holding  
18 that "[a]n antitrust injury must be the direct result of the defendant's conduct[,] . . .  
19 [and] may not be derivative and indirect or secondary, consequential, or remote")  
20 (internal quotations omitted). **None** of NLV's allegations even mention its  
21 manufacturing of cannabis vaporizer components or complete "closed cannabis oil  
22 vaporizer systems," let alone attempt to explain how any of Smoore's alleged  
23 conduct would affect its manufacturing costs. NLV's claim to have incurred higher  
24 **manufacturing** costs is thus completely unsupported and utterly implausible.

25 Second, NLV's allegations of increased distribution costs are similarly  
26 threadbare, describing only trivial harm to itself. These allegations boil down to a  
27 **single** alleged missed opportunity: the purported loss of a former distributor,  
28 Greenlane, when that company "merged with KushCo Holdings." A&C ¶ 64. Loss

1 of access to a single distributor (across the entire U.S. market) does not constitute  
2 antitrust injury or market-wide impact on the alleged market. Calling this an  
3 “important distribution opportunity with one of the largest distributors in the United  
4 States,” *id.*, is facially insufficient to show the requisite antitrust injury. The antitrust  
5 laws do not exist to ensure that NLV can win every opportunity for every  
6 distribution relationship in the marketplace. Indeed, battles over exclusive  
7 opportunities like the one purportedly created by the Greenlane-KushCo merger are  
8 “a vital form of rivalry, and often the most powerful one, which the antitrust laws  
9 encourage rather than suppress.” *Applied Med. Res. Corp. v. Ethicon, Inc.*, No. SA-  
10 CV-031329-JVS-MLGx, 2006 WL 1381697, at \*2 (C.D. Cal. Feb. 3, 2006).

11 **3. NLV Fails to Allege the “Substantial Foreclosure” Required for**  
12 **Exclusive Dealing Claims Under the Sherman Act.**

13 Exclusive dealing arrangements violate the Sherman Act only if their “effect  
14 is to foreclose competition in a **substantial share** of the line of commerce  
15 affected.” *Id.* (emphasis added, internal citations omitted). NLV fails to state a claim  
16 of this required substantial foreclosure because (1) it does not plausibly allege  
17 foreclosure from a relevant market from the loss of a single distributor while  
18 Smoore was allegedly in rapid decline; and (2) it admits that other distribution  
19 channels exist (including self-distribution and other large national distributors) but  
20 ignores them entirely in its foreclosure allegations.

21 **a. NLV’s Allegations Fail to Plausibly Show That It Was**  
22 **Foreclosed from a “Substantial” Portion of Any Market.**

23 NLV fails to plausibly allege impact on any market that would permit an  
24 inference of “substantial” foreclosure. Because “[t]here are well-recognized  
25 economic benefits to exclusive dealing arrangements, including the enhancement of  
26 interbrand competition,” a showing of “substantial” foreclosure is necessary to  
27 avoid chilling procompetitive conduct. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127  
28 F.3d 1157, 1162 (9th Cir. 1997). “To plausibly allege foreclosure . . . [in a]

1 market—in a substantial share or otherwise—plaintiffs at the very least needed to  
2 plead facts sufficient to support the inference that the exclusive dealing  
3 arrangements have some appreciable impact on the market.” *Eastman v. Quest*  
4 *Diagnostics Inc.*, 724 F. App’x 556, 558 (9th Cir. 2018). NLV’s counterclaims fail  
5 this test, alleging at most, “foreclosure” from a single distribution opportunity with  
6 Greenlane. A&C ¶¶ 64, 25-26.

7 The remainder of NLV’s allegations amply demonstrate that NLV has not  
8 been substantially foreclosed from any market by Smoore. As NLV admits, despite  
9 Smoore’s early entry into the industry, Smoore has **lost** many customers and ceded  
10 much of its early lead as other players have entered the market with competing  
11 products. NLV alleges that Smoore went through a “precipitous” loss of market  
12 share, losing between 30-40% in a period of less than five years, with Smoore’s  
13 largest market share losses occurring since 2022.<sup>2</sup> *Id.* at ¶¶ 29-30. NLV alleges **no**  
14 point at which Smoore has been able to improve its market position at all—at the  
15 expense of NLV or any of the other numerous “upstart American competitors” that  
16 recently flooded the U.S. market. *Id.* at ¶ 29. And during the period of the purported  
17 conspiracy, Smoore was alleged to miss its financial targets so dramatically that it  
18 was forced to issue warnings to investors in 2023. *Id.* at ¶ 100. It defies logic that  
19 Smoore could simultaneously be in precipitous decline while substantially  
20 foreclosing market share from NLV across the U.S.

21 According to NLV, Smoore’s decline was a direct result of other competitors  
22 responding to demand more nimbly in the market and consistently taking business

23 \_\_\_\_\_  
24 <sup>2</sup> These percentages assume that NLV has actually pled a proper relevant market, in  
25 which NLV alleges that Smoore’s “market share” for “closed cannabis oil vaporizer  
26 systems” fell to “approximately 50-60%” sometime in 2023. A&C ¶¶ 30, 83. But as  
27 explained earlier, *see supra* Section III.A., Smoore’s “market share” in the sale of  
28 such systems is actually zero because it does not sell the product NLV has alleged as  
comprising the relevant market. This failure makes it impossible to assess what  
portion of any market is actually “foreclosed,” if any.

1 from Smoore by providing a better product to consumers. *Id.* at ¶¶ 27-28. In other  
2 words, NLV has managed to “plead itself out of court by alleging facts that are  
3 inconsistent with its claim.” *FLAA v. Hollywood Foreign Press Ass’n*, 55 F.4th 680,  
4 692 (9th Cir. 2022) (affirming dismissal of Sherman Act claims). NLV’s claims of  
5 substantial foreclosure are therefore implausible and should be dismissed.

6 **b. NLV’s Allegations Ignore Self-Distribution Realities.**

7 NLV’s market foreclosure arguments ignore the reality, recognized in the  
8 complaint and the ITC Initial Determination, of self-distribution. Courts recognize  
9 that, when a competitor can reach their target customer “by employing existing or  
10 potential alternate channels of distribution,” there is no substantial foreclosure in the  
11 relevant market. *See Barnes v. JFK Mem’l Hosp., Inc.*, No. EDCV17681JGBSPX,  
12 2017 WL 7240813, at \*7 (C.D. Cal. Aug. 28, 2017).

13 Addressing the availability of such alternatives is key to plausibly pleading  
14 any claim of substantial foreclosure. *Id.* (citing 2A Areeda, Antitrust Law ¶ 570b1  
15 (foreclosure calculation “includes the full range of selling opportunities reasonably  
16 open to rivals”). NLV’s counterclaims admit that self-distribution is a reality of the  
17 market and it is currently utilized by Smoore. A&C ¶ 52. And despite pointing  
18 repeatedly to the ITC’s Initial Determination, NLV conspicuously fails to note the  
19 ALJ’s finding that “[i]n many instances, a distribution partner such as Greenlane or  
20 Jupiter is **skipped entirely** because the CCELL-branded products are drop-shipped  
21 from Smoore in China directly to [cannabis oil producer] customers in the United  
22 States.” A&C Ex. 2, ITC Initial Determination (“ITC ID”) at 97 (emphasis added).  
23 NLV fails to allege any reason that option would not be a sufficient alternative for  
24 NLV. The presence of alternative distribution channels and NLV’s failure to allege  
25 why NLV cannot utilize those alternatives are lethal to their Sherman Act  
26 counterclaims as a matter of law. Here, NLV is “free to sell directly, to develop  
27 alternative distributors, or to compete for the services of the existing distributors.  
28 Antitrust laws require no more.” *Omega Env’t, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157,

1 1163 (9th Cir. 1997); *Eastman v. Quest Diagnostics Inc.*, 724 F. App'x 556, 558  
2 (9th Cir. 2018) (affirming dismissal of Sherman Act Section 1 claims where  
3 pleadings lacked “a sufficient factual basis from which it is possible to infer that any  
4 particular portion of the [] market was foreclosed as a result of exclusive dealing”).

5 **C. NLV’s Claims that Smoore’s Enforcement of its Patents is**  
6 **Anticompetitive Are Barred by Noerr-Pennington Immunity.**

7 NLV’s claim that Smoore is unlawfully excluding competitors by enforcing  
8 its patent rights also fails as a matter of law. *See* A&C ¶¶ 127-45 (Counts IV  
9 (monopolization), V (attempted monopolization), and VI (California Cartwright  
10 Act)). Smoore’s petitioning of the courts for resolution of its patent infringement  
11 claims is protected under the First Amendment and the Supreme Court’s *Noerr-*  
12 *Pennington* doctrine. *Prof’l Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*,  
13 508 U.S. 49, 56 (1993) (“Those who petition government for redress are generally  
14 immune from antitrust liability.”). Those constitutional protections extend equally to  
15 all patent enforcement efforts, whether successful or not. “Neither the bringing of an  
16 unsuccessful suit to enforce patent rights, nor the effort to enforce a patent that falls  
17 to invalidity, subjects the suitor to antitrust liability.” *C.R. Bard, Inc. v. M3 Sys.,*  
18 *Inc.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998).

19 Antitrust claims attacking patent enforcement efforts “pose[] a unique risk to  
20 the exercise of First Amendment rights” because “the long drawn out process of  
21 [antitrust] discovery can be both harassing and expensive.” *Dairy, LLC v. Milk*  
22 *Moovement, Inc.*, No. 2:21-cv-02233 WBS AC, 2022 WL 4387981, at \*3 (E.D. Cal.  
23 Sept. 22, 2022). They also seriously risk “chill[ing] legitimate patent enforcement  
24 efforts because of the fear of the vexatious or punitive consequences of treble  
25 damages suits.” *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir. 1985).  
26 As such, before NLV can weaponize allegations of “sham litigation” against  
27 Smoore’s rights under the First Amendment and patent law to petition the courts,  
28 those allegations should be subject to heightened standards under Ninth and Federal

1 Circuit law. Those standards “require more specific allegations than would  
2 otherwise be required,” *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1036, 1059 (9th Cir.  
3 1998), particularly where fraudulent conduct is alleged. *See FutureLogic, Inc. v.*  
4 *TransAct Techs., Inc.*, No. CV 05-03754 MMM (CTx), 2007 WL 9700696, at \*7  
5 (C.D. Cal. Oct. 30, 2007) (under Federal Circuit standard, claims that *Noerr-*  
6 *Pennington* immunity does not apply due to alleged fraud “must be pled with  
7 particularity under Rule 9(b) of the Federal Rules of Civil Procedure”).

8 The Federal Circuit has recognized only two narrow exceptions to the broad  
9 protections of *Noerr-Pennington* immunity.<sup>3</sup> First, a lawsuit may be considered a  
10 “sham” only if it is both “objectively baseless” and brought with “unlawful”  
11 motivation to destroy competition. *Aventis Pharma S.A. v. Amphastar Pharms., Inc.*,  
12 2009 WL 8727693, at \*7 (C.D. Cal. Feb. 17, 2009). Second, a party may lose  
13 *Noerr-Pennington* protections if it “commits knowing fraud on a court by making  
14 intentional misrepresentations severe enough to deprive the litigation of its  
15 legitimacy.” *Id.* (internal quotations omitted). Finally, while the Federal Circuit has  
16 never “expressly recognize[d]” any other immunity exception, *id.*, the Ninth Circuit  
17 has carved out a third exception for a “series of lawsuits” when “brought pursuant to  
18 a policy of starting legal proceedings without regard to the merits and for an  
19 unlawful purpose.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006).

20 Under the heightened pleading standard applicable here, NLV must plead  
21 “**specific allegations** demonstrating that” an exception is met and “the *Noerr-*  
22 *Pennington* protections **do not apply**.” *Wonderful Real Est. Dev. LLC v. Laborers*  
23 *Int’l Union of N. Am.*, No. 1:19-cv-00416-LJO-SKO, 2020 WL 91998, at \*7 (E.D.  
24

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25 <sup>3</sup> Because issues of *Noerr-Pennington* immunity often arise as part of counterclaims  
26 to patent infringement lawsuits, the Federal Circuit has held that its own precedent  
27 applies to the question of immunity in that context, while law of the regional circuit  
28 applies for all other aspects of an antitrust claim. *See Nobelpharma AB v. Implant*  
*Innovations, Inc.*, 141 F.3d 1059, 1067-68 (Fed. Cir. 1998).

Cal. Jan. 8, 2020) (emphasis added). NLV thus bears the burden. NLV’s counterclaims fail to pass muster under both the heightened pleading standard here and the plausibility requirement under *Twombly*, and should be dismissed.

**1. NLV Fails to State a Claim that Smoore’s Patent Claims Constitute “Sham Litigation”**

**a. NLV Does Not Plausibly Allege that Smoore’s U.S. Patent Enforcement Efforts Are Objectively Meritless**

NLV’s counterclaims cannot fit within the narrow first “sham litigation” exception to First Amendment immunity. Regarding the ITC proceeding instituted by Smoore, NLV cherry-picks certain findings of the ITC, *see* A&C ¶¶ 40-43, to implausibly allege that Smoore’s patent claims there were wholly lacking in objective merit. In the ITC proceeding, Smoore alleged infringement of three utility patents (the ‘623 Patent, ‘762 Patent, and ‘763 Patent) and one trademark against NLV and others. Most of NLV’s sham allegations focus myopically on the ‘623 Patent, claiming that the patent is unenforceable due to an inaccurate statement made by a patent agent (who was not representing Smoore) as part of the application process. But the ‘623 Patent is *not* part of Smoore’s claims in the instant lawsuit—and NLV admits as much. A&C ¶ 44. NLV’s conclusory and nonsensical allegation that “the real goal of this litigation is to attempt to enforce the much broader rights under the ‘623 Patent,” *id.* ¶ 128, is irrelevant to the objective merit of Smoore’s patent claims in this lawsuit on wholly separate patents. NLV has thus pled nothing that could plausibly support a finding that the **current lawsuit** is objectively meritless, as required.

In his Initial Determination, the ITC Administrative Law Judge (“ALJ”) simply found that Smoore had not provided sufficient evidence to satisfy the ITC’s “domestic industry” test—an analysis of a patentee’s investments in the U.S. economy related to its claimed patent that is not an element of patent claims in district court. NLV’s conclusory allegations that Smoore’s arguments to the ITC on the domestic industry test were “improper,” “wrongful,” and “misrepresentations”

1 twist the findings of the ALJ beyond recognition. The ALJ nowhere applied these  
2 pejoratives to Smoore’s arguments, finding instead, as a purely evidentiary matter,  
3 that some but not all of the U.S. investments and expenses claimed as “domestic  
4 industry” by Smoore were cognizable under that doctrine. The ALJ concluded that  
5 there was insufficient evidence in the record to “adjust [those] investments to reflect  
6 properly cognizable investments.” *See* A&C, Ex. 2 at 95-102. That is run-of-the-mill  
7 fact-finding, not an endorsement of NLV’s extreme and implausible position that  
8 Smoore’s claims were **objectively** meritless. And it is wholly insufficient to satisfy  
9 NLV’s pleading burden where First Amendment rights are at stake, because a  
10 “heightened pleading standard . . . would have no force if in order to satisfy it, a  
11 party could simply recast disputed issues from the underlying litigation as  
12 ‘misrepresentations’ by the other party.” *Or. Nat. Res. Council v. Mohla*, 944 F.2d  
13 531, 535 (9th Cir. 1991).

14 Without the benefit of its specious argument regarding the “domestic  
15 industry” test, NLV’s counterclaims are bereft of **any** factual allegations that could  
16 support a finding of objective baselessness as to Smoore’s ‘762 Patent, ‘763 Patent,  
17 or trademark claims at the ITC. NLV’s sham litigation claim as to the ITC  
18 proceeding therefore fails as a matter of law. *See Meridian Project Sys., Inc. v.*  
19 *Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1221–22 (E.D. Cal. 2005) (“Thus,  
20 [defendant’s] allegation that a single claim is objectively baseless does not bring  
21 [plaintiff’s] filing of the entire complaint within the sham exception.”).

22 **b. NLV’s Allegations Regarding Smoore’s Enforcement**  
23 **Efforts in China Fail to State a Claim**

24 NLV’s allegations about Smoore’s patent claims in China offer no plausible  
25 support for the required showing of a lack of objective merit, and cannot support an  
26 antitrust claim. NLV improperly asks this Court to decide the validity of foreign  
27 patents and alleges no effect on U.S. commerce.

28 First, as NLV concedes, Smoore’s Chinese patent claims were not even

1 asserted against NLV. *See* A&C ¶ 45. Smoore brought a design patent claim against  
2 Naixing, which happened to be an NLV supplier. *Id.* NLV fails to allege any facts  
3 suggesting that Smoore’s prosecution of patent claims in China, against a third  
4 party, had any proximate impact on NLV in the U.S.

5 Second, NLV admits that Smoore **prevailed** at the Shenzhen Intermediate  
6 People’s Court (the lower court) because Naixing “did not adequately establish its  
7 defenses.” A&C ¶ 9. Yet NLV’s claims omit that Smoore prevailed **again** at the  
8 appellate level in its patent infringement claims against Naixing. *See* Koons Decl.,  
9 Ex. A (Decision of the Guangdong High People’s Court) at 9-12.<sup>4</sup> This further  
10 demonstrates that the Chinese action was anything but meritless. “A winning lawsuit  
11 is by definition a reasonable effort at petitioning for redress and therefore not a  
12 sham.” *Prof’l Real Est. Invs.*, 508 U.S. at 60 n.5.

13 Third, NLV’s claim improperly seeks to extend U.S. antitrust law to attack  
14 and relitigate foreign patent proceedings. The Federal Circuit has recognized that  
15 U.S. “courts should not determine the validity and infringement of foreign patents,”  
16 as would be required to assess whether this **Chinese** patent proceeding was  
17 objectively baseless. *Voda v. Corvis Corp.*, 476 F.3d 887, 899 (Fed. Cir. 2007)  
18 (recognizing the “independence of each country’s sovereign patent systems and their  
19 systems for adjudicating those patents”). NLV also alleges nothing about the effect  
20 Smoore’s Chinese patent claims had on U.S. commerce. This is fatal to NLV’s  
21 allegations because foreign conduct is actionable only when it has a “direct,  
22 substantial, and reasonably foreseeable effect” on U.S. commerce. 15 U.S.C.  
23 § 6a(1)(A). The Supreme Court defines a “direct effect” as one that “follows as an  
24 immediate consequence of the defendant’s activity.” *United States v. LSL*

25 \_\_\_\_\_  
26 <sup>4</sup> The Court may take judicial notice of foreign court decisions for purposes of  
27 deciding a motion to dismiss when “the facts noticed are not subject to reasonable  
28 dispute.” *GT Beverage Co. v. Coca Cola Co.*, No. SACV 10-00209-JVS (RNBx),  
2010 WL 11595832, at \*2 (C.D. Cal. Aug. 2, 2010).

1 *Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). NLV alleges no effect at all  
2 from this Chinese litigation against a Chinese supplier, let alone an “immediate” one  
3 on the U.S. market. NLV’s sham allegations regarding Smoore’s Chinese patent  
4 litigation must therefore be dismissed.

5 **2. NLV’s Allegations of Intentional “Misrepresentations” and**  
6 **“Knowingly Fraudulent” Statements Cannot Defeat *Noerr-Pennington* Immunity.**

7 NLV’s inflammatory and unsupported allegations regarding “fraudulent”  
8 conduct and “misrepresentations” to the ITC and the Chinese court do not satisfy  
9 NLV’s burden under the second exception to *Noerr-Pennington* immunity—that  
10 Smoore allegedly committed “knowing fraud on a court by making intentional  
11 misrepresentations severe enough to deprive the litigation of its legitimacy.”  
12 *Aventis*, 2009 WL 8727693, at \*7. This exception requires more than claims that  
13 alleged fraud may have influenced a tribunal’s decision. *Omni Res. Dev. Corp. v.*  
14 *Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (such allegations “can easily be  
15 leveled” and are “thus insufficient by [themselves] to overcome *Noerr-Pennington*  
16 immunity.”).

17 NLV fails to allege that the ITC action was influenced at all by any alleged  
18 misrepresentations by Smoore. Indeed, the ALJ in the ITC action found for NLV  
19 after the factual disputes it hyperbolizes into “misrepresentations” were argued  
20 before and considered by the ALJ. As such, even if Smoore made any such  
21 misrepresentations (it did not), it had zero impact on the outcome of the proceedings  
22 and thus had no impact on NLV. *See MedImmune, Inc. v. Genentech, Inc.*, No. CV  
23 03-2567 MRP, 2003 WL 25550611, at \*7 (C.D. Cal. Dec. 23, 2003) (holding that  
24 sham claim failed where tribunal “did not rely” on alleged misrepresentation, so  
25 party “could not have sustained [any] injury”).

26 NLV’s allegations likewise fail with regard to the Chinese patent action. NLV  
27 alleges that Naixing has “uncovered evidence” regarding the Chinese litigation that  
28 it claims supports Naixing’s invalidity defenses. *Id.* ¶¶ 12, 46. But the Chinese

1 appellate court already considered (and rejected as insufficient) the “video from the  
2 conference in question” that NLV alleges as proof of misrepresentation, *see* A&C  
3 ¶ 46, and ruled for Smoore while fully aware of the factual dispute over the alleged  
4 misrepresentation at issue here and despite Naixing’s request for an extension to  
5 take additional U.S. discovery. *See* Koons Decl., Ex. A at 9, 12. This is yet another  
6 example of NLV “simply recast[ing] disputed issues . . . as ‘misrepresentations,’”  
7 which cannot meet their burden under a heightened pleading standard. *Mohla*, 944  
8 F.2d at 535. The Chinese action is also still ongoing, as Naixing has petitioned the  
9 Supreme People’s Court for review of the two rulings in Smoore’s favor. NLV thus  
10 has no basis to claim that either prior action (and certainly not this one) has been  
11 “deprived of its legitimacy” as required to support the second exception to *Noerr-*  
12 *Pennington* immunity.<sup>5</sup>

### 13 **3. NLV Cannot Demonstrate a “Policy” or “Pattern” of Allegedly** 14 **Baseless Suits.**

15 The Federal Circuit has not recognized any additional exception to *Noerr-*  
16 *Pennington* immunity for a series of lawsuits. *See Aventis*, 2009 WL 8727693, at \*7.  
17 But assuming a Ninth Circuit exception applies here, NLV’s counterclaims cannot  
18 fit within it. NLV’s attempt to allege a “pattern and practice . . . to assert patents that  
19 Smoore knew or should have known were invalid and unenforceable,” A&C ¶ 48,  
20 falls far short of adequately pleading a “series of lawsuits . . . brought pursuant to a  
21 policy of starting legal proceedings without regard to the merits and for an unlawful  
22 purpose” under Ninth Circuit precedent. *Sosa*, 437 F.3d at 938.

23 NLV has alleged at most three proceedings: the ITC action, a Chinese court

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24  
25 <sup>5</sup> NLV nowhere characterizes its allegations as stating a so-called “*Walker Process*”  
26 claim, which has distinct legal criteria from “sham litigation” and focuses on fraud  
27 on the U.S. Patent and Trademark Office rather than on a court. NLV could not  
28 satisfy that “difficult . . . to meet” standard regardless, *MedImmune*, 2003 WL  
25550611, at \*9-10, as nothing in its conclusory allegations plausibly suggests  
fraudulent conduct by Smoore.

1 action to enforce a design patent (which Smoore won at the lower court and  
2 appellate levels), and this lawsuit covering a set of patents only partially overlapping  
3 with those at issue in the ITC action. The Ninth Circuit has held that a mere  
4 “handful of legal proceedings,” like NLV alleges here, “does not amount to a  
5 ‘pattern’ of baseless claims” even if assuming that those prior claims are lacking in  
6 merit. *Kottle*, 146 F.3d at 1063. And courts in this district have repeatedly held that  
7 four actions—more than NLV alleges here—are not enough. *See, e.g., Toyo Tire &*  
8 *Rubber Co. v. CIA Wheel Grp.*, No. SA-CV-15246-JLS-DFMx, 2015 WL 4545187,  
9 at \*3 (C.D. Cal. July 8, 2015) (“[Plaintiff’s] three lawsuits and International Trade  
10 Commission activity do not constitute a ‘series of lawsuits’ within the meaning of  
11 the ‘pattern exception.’”). NLV thus fails to state a claim under any potentially  
12 applicable exception to *Noerr-Pennington* immunity.

13 **D. NLV Fails to Plausibly Allege a “Dangerous Probability” of**  
14 **Monopolization**

15 A “dangerous probability of achieving monopoly power” is an essential  
16 element of any attempted monopolization claim. *Spectrum Sports, Inc. v.*  
17 *McQuillan*, 506 U.S. 477, 456 (1993). As an initial matter, NLV’s attempted  
18 monopolization claim fails because Smoore does not compete in the alleged relevant  
19 product market and thus has zero percent market share. There is thus no dangerous  
20 probability that Smoore will achieve monopoly power. *See supra* Section III.A.

21 Even assuming Smoore possesses the market shares alleged (it does not),  
22 NLV’s allegation of a “dangerous probability” of monopolization is classic  
23 boilerplate. NLV’s allegations are also directly contradicted by admissions that  
24 Smoore’s market position and profits have precipitously **declined**. A&C ¶¶ 26-30,  
25 100. NLV admits that Smoore’s “rapid decline in fortunes” started “around 2018 or  
26 2019, [when] Smoore began losing market share to [NLV and other] upstart  
27 American competitors.” *Id.* ¶¶ 31, 28-29. And “[e]ven as the market for cannabis  
28 vaporizers was growing, with sales as much as doubling between 2020 and 2022,

1 Smoore’s market share quickly began to erode.” *Id.* ¶ 30. “Between 2018 and 2023,  
2 Smoore’s market share” **dropped** by at least 20-30%. *Id.* Smoore’s rapid decline,  
3 NLV alleges, is reflected in Smoore’s publicly available annual reports. *Id.* ¶ 100 &  
4 nn.11-13. NLV argues that “[i]n 2022, Smoore’s total revenue declined as its gross  
5 profit margin dropped sharply, [from 53.6%] to 43.4%. In 2023, Smoore issued a  
6 warning to investors that net profit for the first 6 months of the year would be  
7 starkly lower than the previous year as revenues had declined again.” *Id.*

8 Indeed, NLV alleges that Smoore’s hemorrhaging of business and profit  
9 margin has only **accelerated** in recent years, well after any alleged “plan to suppress  
10 and eliminate competition” was launched. *Id.* ¶¶ 30-31 (“Most of this market share  
11 loss did not take place until 2022.”). It is wholly implausible that this accelerating  
12 decline could suddenly reverse course when assuming NLV’s factual allegations are  
13 accurate—and yet that is exactly what would be required to demonstrate a  
14 “dangerous probability” of monopolization. *See Sidibe v. Sutter Health*, No. 12-cv-  
15 04854-LB, 2021 WL 879875, at \*9 (N.D. Cal. Mar. 9, 2021) (granting summary  
16 judgment on lack of dangerous probability of monopolization where evidence  
17 showed “either no increase or falling market share”). And such a theory is  
18 contradicted by NLV’s argument that there are “serious weakness[es] with Smoore’s  
19 products” and that “competing” companies have successfully “take[n] advantage of  
20 Smoore’s failure to keep up” with better competing technology. A&C ¶¶ 27, 28.  
21 NLV thus cannot plausibly allege a dangerous probability of monopolization and its  
22 attempted monopolization claim should be dismissed.

23 **E. NLV’s California Cartwright Act Claim Fails for the Same Reasons as**  
24 **its Sherman Act Claims.**

25 NLV’s duplicative claim under the California Cartwright Act, based on  
26 exactly the same allegations as its Sherman Act claims, should be dismissed for the  
27 same reasons. *See Sabry Lee, Inc. v. Genera Corp.*, No. CV 08-5758-GW(PJWX),  
28 2009 WL 10674318, at \*5 (C.D. Cal. Feb. 12, 2009) (“The analysis under

1 California's Cartwright Act mirrors the analysis under federal law because the act  
2 was modeled after the Sherman Act.”). The protections of the First Amendment and  
3 the *Noerr-Pennington* doctrine apply with equal force to state law claims, *see Rock*  
4 *River Commc 'ns, Inc. v. Universal Music Grp.*, No. CV-080635-CAS-AJWx, 2008  
5 WL 11338096, at \*4 (C.D. Cal. Aug. 25, 2008), and NLV has failed to allege facts  
6 fitting with any of the narrow exceptions to immunity. And the same principles of  
7 antitrust standing and the requirement for antitrust injury, long recognized by the  
8 Supreme Court, also apply under California law. *See Cellular Plus, Inc. v. Super.*  
9 *Ct.*, 14 Cal. App. 4<sup>th</sup> 1224, 1234-35 (1993) (recognizing that “antitrust injury” under  
10 California law is defined by the same standard as federal law: the “type of injury the  
11 antitrust laws were intended to prevent, and which flows from the invidious conduct  
12 which renders defendants’ acts unlawful”).

13 **F. NLV’s Patent Counterclaim Should Be Dismissed.**

14 NLV’s claim that Smoore “actively, knowingly, and intentionally induces  
15 others, including its customers and end users, to infringe one or more claims of the  
16 ‘294 Patent” should be dismissed because it fails to adequately plead knowledge.  
17 A&C ¶ 148. Induced infringement requires knowledge of the patent and knowledge  
18 of patent infringement. *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926  
19 (2015). However, “knowledge after filing of the present action is not sufficient for  
20 pleading the requisite knowledge for indirect infringement.” *Proxyconn Inc. v.*  
21 *Microsoft Corp.*, No. SACV 11-1681 DOC ANX, 2012 WL 1835680, at \*6 (C.D.  
22 Cal. May 16, 2012); *see also Sonos, Inc. v. Google LLC*, 591 F. Supp. 3d 638, 645  
23 (N.D. Cal. 2022) (finding “a mere allegation of ‘knowledge’ remains conclusory and  
24 insufficient” for induced infringement). NLV only pleads that “Smoore has had  
25 **knowledge** of the ‘294 Patent at least **as of the filing of this counterclaim.**” A&C ¶  
26 148 (emphasis added). Because NLV fails to plead knowledge by Smoore with any  
27 particularity at the relevant time, NLV’s induced infringement claim should be  
28 dismissed.

1 **IV. NLV's AND A&A's AFFIRMATIVE DEFENSES SHOULD BE**  
2 **STRICKEN**

3 Rule 12(f) of the Federal Rules of Civil Procedure authorizes this Court to  
4 “strike from a pleading” any “insufficient defense.” Fed. R. Civ. P. 12(f). Courts in  
5 the Central District apply the standard set in *Twombly* and *Iqbal* for pleadings to  
6 affirmative defenses. *Vogel v. Huntington Oaks Del. Partners, LLC*, 291 F.R.D. 438,  
7 440 (C.D. Cal. 2013). As such, parties are required to plead their affirmative  
8 defenses to the standard of *Twombly* and *Iqbal*, or they should be stricken.<sup>6</sup>

9 **First and Second Affirmative Defenses.** Failure to state a claim and  
10 noninfringement are not cognizable affirmative defenses and should be stricken.  
11 *Figueroa v. Marshalls of CA, LLC*, No. CV11-06813-RGK (SPx), 2012 WL  
12 1424400, at \*3 (C.D. Cal. Apr. 23, 2012) (failure to state a claim); *Roland Corp. v.*  
13 *Inmusicbrands, Inc.*, No. 2:16-cv-06256-DBM-AJWx, 2017 WL 513924, \*2 (C.D.  
14 Cal. Jan. 26, 2017) (noninfringement).

15 **Third, Fourth, Fifth, Eighth, Twelfth, and Thirteenth Affirmative**  
16 **Defenses.** NLV and A&A provide no underlying factual basis, and even fail to  
17 recite many of the requisite elements for these affirmative defenses. Because this  
18 fails to meet the pleading standard of *Twombly* and *Iqbal*, they should be stricken.

19 **Sixth and Eleventh Affirmative Defenses.** Smoore has been the original  
20 assignee and sole owner of all the Patents-in-Suit since their inception. Furthermore,  
21 Smoore pled that it is “the sole and exclusive owner of all right, title and interest in  
22 the ’762, ’763, D544, D534, and D635 Patents and holds the exclusive right to take  
23 all actions necessary to enforce its rights.” Complaint ¶ 19. As such, both these  
24 defenses should be stricken.

25 **Seventh and Ninth Affirmative Defenses.** The Federal Circuit has stated  
26 that “limitation[s] on damages, [are] not . . . affirmative defense[s].” *Arctic Cat Inc.*

27 <sup>6</sup> NLV's and A&A's affirmative defenses are identical. *Compare* Case No. 07646-  
28 AB-AGR, ECF No. 36 at 8-11, *with* Case No. 08014-AB-AGR, ECF No. 35 at 8-11.

1 *v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1366 (Fed. Cir. 2017). As  
2 such, these defenses should be stricken.

3 **Tenth Affirmative Defense.** Contesting attorney’s fees pursuant to 35 U.S.C.  
4 § 285 is not a cognizable affirmative defense. *Sloan Valve Co. v. Zurn Indus., Inc.*,  
5 712 F. Supp. 2d 743, 756 (N.D. Ill. 2010), as corrected (May 6, 2010). As such, this  
6 defense should be stricken.

7 **V. IN THE ALTERNATIVE, SHOULD THE COURT NOT DISMISS ALL**  
8 **ANTITRUST COUNTERCLAIMS, THE COURT SHOULD**  
9 **BIFURCATE AND STAY THE ANTITRUST COUNTERCLAIMS**  
10 **PENDING RESOLUTION OF THE PATENT CLAIMS**

11 **A. Legal Standard for Bifurcation and Stay**

12 Under Federal Rule of Civil Procedure 42(b), courts have broad discretion to  
13 try claims separately to “increase convenience and judicial economy, reduce the risk  
14 of jury confusion, and avoid prejudice to the parties.” *Michael Kors, L.L.C. v.*  
15 *Chunma USA, Inc.*, No. CV 16-01271-AB (AFM), 2017 WL 5665003 at \*1 (C.D.  
16 Cal. Aug. 30, 2017) (Birotte, J.) (bifurcating liability and damages in trademark  
17 matter). Regarding antitrust counterclaims in patent matters, “[s]o many cases have  
18 granted motions to bifurcate patent-related antitrust claims from infringement  
19 claims, that even the Federal Circuit has commented that granting bifurcation is  
20 ‘now-standard practice.’” 6 ANPATDIG § 39:100 (June 2023 Update) (quoting *In*  
21 *re Innotrol Diagnostics*, 800 F.3d 1077, 1084 (Fed. Cir. 1986)). Also, when  
22 addressing antitrust counterclaims in patent matters, “district courts often stay an  
23 antitrust counterclaim until the issues of patent infringement and validity are  
24 resolved.” *Fitbit, Inc. v. Aliphcom*, No. 5:15-CV-04073-EJD, 2016 WL 7888033, at  
25 \*1 (N.D. Cal. May 27, 2016). Bifurcation and a stay of antitrust counterclaims are  
26 specifically warranted when the resolution of the initial patent claims would  
27 “inform[]” a determination of whether a counterclaimants allegations that those  
28 initial patent claims were a “sham.” *Edwards Vacuum, LLC v. Hoffman*  
*Instrumentation Supply, Inc.*, 556 F. Supp. 3d 1156, 1180 (D. Or. 2021)

**B. Bifurcation of the Antitrust Counterclaims is Warranted.**

Bifurcation of the antitrust counterclaims is required here: (1) to promote judicial economy by expediting the resolution of the patent claims, which might eliminate the need for ever addressing the antitrust counterclaims and avoid potentially unnecessary discovery expense; (2) to reduce the risk of confusing the jury while simplifying the evidence and issues to be presented; and (3) to avoid potential prejudice to Smoore by the presentation of irrelevant and inflammatory evidence that might improperly impact the jury when assessing the patents at issue.

First, bifurcation of the antitrust claims will conserve both judicial and party resources and promote efficiency. *Edwards Vacuum*, 556 F. Supp. 3d at 1180 (“Bifurcation allows for (1) quicker resolution of the intellectual property infringement issue as there is less discovery required, and (2) judicial economy as the antitrust and unfair competition claims may not have to be heard if intellectual property infringement is proved in the first trial.”) (internal alterations omitted). Resolution of NLV’s antitrust counterclaims may never be necessary, or their scope will at least be significantly narrowed if the initial, patent claims are resolved in Smoore’s favor. For example, if the jury finds that Smoore’s patents are valid during the patent case, that would require a finding that Smoore’s filing of the patent case was not a sham and likely lead to the dismissal of NLV’s counterclaims. *Id.*

Bifurcation could also eliminate the need for expensive antitrust fact and expert discovery. Here, the antitrust counterclaims will require resolution of a myriad of issues that are unconnected to the patent claims, including industry practices related to exclusivity and distribution agreements, market foreclosure, potential business justifications for certain conduct, antitrust causation and antitrust injury. Indeed, NLV has already served 66 expansive requests for production on antitrust issues, seeking documents from the last ten years related to Smoore’s manufacturing, marketing, distribution, sales, pricing, business strategy, market analysis, communications with other industry players, and many other topics. *See*

1 Koons Decl. ¶ 4. Bifurcating the antitrust counterclaims will remove these complex  
2 tangents, as well as the extensive issues related to the *Noerr-Pennington* doctrine  
3 discussed above, from immediate consideration and allow the Court to proceed  
4 expeditiously and narrowly on those issues related to the patent claims. *Edwards*  
5 *Vacuum*, 556 F. Supp. 3d at 1180 (“Whether [Plaintiff’s] trade secret claims are  
6 objectively baseless [to refute a *Noerr-Pennington* defense] may be informed by the  
7 jury’s verdict on those claims, or possibly even by the Court’s ruling on a motion for  
8 summary judgment.”); *see also Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 536  
9 (9th Cir. 1995) (“If the plaintiff wins the patent infringement suit, then the antitrust  
10 counterclaim may ordinarily be disposed of expeditiously on motion, instead of by a  
11 time consuming and expensive trial.”)

12 Second, bifurcation will reduce the risk of jury confusion. NLV’s antitrust  
13 claims will require both sides to present highly complicated factual and economic  
14 evidence, the assessment of which would “pose a difficult task for even the most  
15 astute of juries,” particularly when presented simultaneously with patent  
16 infringement evidence. *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, No. 09-80, 2010  
17 WL 925864, at \*1 (D. Del. March 11, 2010) at \*2 (bifurcating antitrust claims that  
18 would require the jury to consider the alleged relevant markets, actual and potential  
19 shares in those markets, barriers to entry, the terms of the party’s contracts and  
20 whether those contracts violated antitrust laws, antitrust damages, and other antitrust  
21 considerations). *Fitbit* is instructive as it involved similar antitrust counterclaims of  
22 monopolization. The Court there granted bifurcation and a stay finding that  
23 “separation simplifies issues, reduces jury confusion, and helps courts manage the  
24 volume and complexity of evidence presented to the jury.” *Fitbit.*, 2016 WL  
25 7888033 at \*1 (citing *Baldwin Hardware Corp. v. Franksu Enter. Corp.*, No. CV-  
26 90-4919-WDK, 1990 WL 357312, at \*2 (C.D. Cal. Dec. 28, 1990) (“[S]eparating  
27 complex antitrust issues of market power and monopoly from patent, unfair  
28 competition and trade dress issues would reduce the likelihood of jury confusion and

1 result in an earlier resolution of the issues in dispute.”)).

2 Third, bifurcation is warranted to reduce any potential prejudice to Smoore.  
3 *See Michael Kors, L.L.C.*, 2017 WL 5665003 at \*1 (bifurcation necessary to “avoid  
4 prejudice to the parties”). NLV’s suggestion, which Smoore vehemently denies, that  
5 Smoore engaged in anticompetitive or monopolistic conduct including an alleged  
6 “conspiracy” to restrain trade and claims of a “sham litigation” or fraud related to a  
7 patent (especially a patent not even at issue in this matter) will significantly and  
8 unfairly impact the jury’s neutral evaluation of the purely technical questions related  
9 to the whether NLV infringed the patents at issue here. In particular, NLV’s  
10 inclusion of unsupported and irrelevant allegations regarding the ‘623 Patent in its  
11 counterclaims when that patent is not at issue in this litigation confirms NLV’s intent  
12 to distract and improperly prejudice the jury with its own made-up and  
13 inflammatory sideshow regarding the history of the ‘623 Patent.<sup>7</sup> Bifurcating the  
14 patent claims and antitrust counterclaims will avoid this improper and prejudicial  
15 result.

16 **C. A Stay of the Antitrust Counterclaims is also Warranted.**

17 The Court should stay the antitrust counterclaims pending resolution of the  
18 patent claims. *Chip-Mender, Inc. v. Sherwin-Williams Co.*, No. C 05-3465 PJH,  
19 2006 WL 13058, at \*13 (N.D. Cal. Jan. 3, 2006) (“It is a common practice in federal  
20 court to stay antitrust counterclaims until after the trial of the invalidity issue.”); *see*  
21 *also Fitbit*, 2016 WL 7888033 at \*1.

22 The extreme burden and expense involved in antitrust fact and expert  
23 discovery and litigation of other issues unique to the antitrust claims weigh heavily

24  
25 <sup>7</sup> Contrary to NLV’s conclusory allegations, the ITC ALJ did not find any “fraud”  
26 by Smoore regarding the ‘623 Patent nor any knowledge on Smoore’s part that the  
27 patent might be unenforceable. Rather, the Initial Determination highlighted that a  
28 lone employee sought out the ‘623 Patent application based on his independent  
research, had his wife’s company acquire it, and then over four years later sold the  
patent to Smoore at a substantial profit. ITC ID at 90-92; Koons Decl. ¶ 3.

1 in favor of a stay of these counterclaims. *See Twombly*, 550 U.S. at 546 (cautioning  
2 not “to forget that proceeding to antitrust discovery can be expensive”). As noted  
3 above, NLV has already served a bevy of antitrust discovery requests that perfectly  
4 illustrate this concern, seeking virtually all of Smoore’s business documents and  
5 data related to cannabis vaping products over nearly an entire *decade*. *See* Koons  
6 Decl. ¶ 4. The risk of expending these funds and effort is especially problematic in  
7 this context when this burden may not even be necessary or, at a minimum, could be  
8 greatly streamlined, depending on the outcome of the initial patent claims. *Chip-*  
9 *Mender*, 2006 WL 13058, at \*13 (“Proceeding on the antitrust claims  
10 simultaneously with the patent claims may delay resolution of the case by increasing  
11 its complexity, whereas many issues will likely be mooted by addressing the patent  
12 claims first.”); *see also Craigslist Inc. v. 3Taps Inc.*, 942 F. Supp. 2d 962, 982 (N.D.  
13 Cal. 2013) (granting bifurcation and a stay given “the likelihood of streamlining  
14 discovery for and adjudication of the antitrust counterclaims based on the outcome  
15 of [Plaintiff’s] claims—even if those counterclaims must ultimately proceed”).

## 16 VI. CONCLUSION

17 For the reasons stated above, NLV’s antitrust and patent counterclaims should  
18 be dismissed and its and A&A’s affirmative defenses stricken. Because no amount  
19 of amending can overcome the defects of NLV’s pleading, the Court should dismiss  
20 the counterclaims with prejudice. In the alternative, the Court should bifurcate any  
21 remaining antitrust counterclaims and stay discovery on those counterclaims.

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